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## “Cruel and Unusual” Checks and Balances: The Supreme Court Writes a Rubber Check

The Constitution provides a check on the powers of Congress and the executive branch in the form of the judiciary branch. Under its power to interpret, or reinterpret, the various provisions of the Constitution, how far may the United States Supreme Court go in divesting individual guarantees? For example, once the Court acknowledges the existence of a guarantee, such as a prohibition against a state-established religion or a right to interstate travel, may the Court simply reverse itself?

The checks and balances the framers of the Constitution intended when they drafted the document establishing an independent judiciary, as shown by history, have survived many drastic changes of circumstances. This comment examines the evolution of the “check” on “cruel and unusual punishment” as applied through the institution of the United States Supreme Court. It is in this Eighth Amendment context that a contemporary perspective now shows the judicial branch acts only to slow, and not to prevent, the application of majority will. A patient majority may be annoyed, perhaps, but will not ultimately be frustrated by the constitutional protections afforded to the minority. This is because the United States Supreme Court appears to limit the application of the death penalty when the majority demands it, and to curtail those same constitutional protections when they prove unpopular. While doubtful capital cases in the past have been resolved in favor of life, a recent case, *Blystone v Pennsylvania*,<sup>1</sup> which was poised on the fulcrum of equilibrium between life and death, tilted to death.

This effect of friction on popular will is arguably the most desirable role for an un-elected branch in a democracy. This comment, however, attempts to demonstrate that if judicial constitutional review mirrors popular opinion in an inexact way, we are deluded to think there is substance in the individual protections of the Bill of Rights and the Fourteenth Amendment. One example of how protections can be curtailed by popular opinion is shown by the long

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1. 494 US 299 (1990).

history of prohibition against cruel and unusual punishment. An examination of the history of Eighth Amendment jurisprudence even allows us to do a certain amount of extrapolation which indicates that other constitutional protections may be subject to popular opinion as well. If protections can be diminished by the judiciary under the guise of a "living" or "evolving" Constitution, as the United States Supreme Court has repeatedly acknowledged, then they are certainly not absolute protections.

Death penalty constitutional jurisprudence is an important and highly visible illustration. When the Bill of Rights was adopted, there was no question that "cruel and unusual" punishment did not encompass the death penalty. While this is true even today, the prohibition against cruel and unusual punishment does prevent certain applications of the ultimate sanction. Even pre-constitutional common law prevented the government from executing or even judging a person guilty when the perpetrator was found to be mentally incompetent. This comment discusses several cases which have strayed far from that doctrine.

As standards of decency "evolved," in accordance with the concept of an evolving Constitution, and all other western democracies abolished the death penalty, the United States Supreme Court expanded the constitutional protections afforded capital defendants in this country. Now, with the death penalty enjoying a resurgence of popular support both among the general population and, as reflected in recent opinions, among the members of the Court, an expansion of the application of the penalty is underway which will not be limited by the Constitution, but only by the yet-to-be-explored limits of what the majority will tolerate.

The arena of Eighth Amendment conflict has, in the past twenty years, been the tension between state legislatures' mandates in death penalty statutes poised against jury discretion in sentencing murderers to death. The earlier statutes tended to give juries a free hand in setting penalties. This comment describes the fundamental changes to that system that occurred when, faced with both peaceful and deadly violent protests against unequal treatment of classes and races, the United States Supreme Court found unbridled jury discretion to be a violation of the Eighth Amendment. This comment's discussion then narrows to very recent cases deciding the limits placed on legislatures when they attempt to define "aggravating circumstances."

A brief overview of the history of the death penalty in America and a consideration of the recent deviations from protections

against capricious application shows the Court leaving the expansion of protections in the past and, in the more recent past, turning headlong into the murky waters of the ultimate sanction.

### THE HISTORY

The death penalty in America has to some extent always reflected the democratic process. A survey of the death penalty's history in America reveals that it has been enforced in great measure to the extent demanded or prohibited by public opinion.<sup>2</sup> Estimates are that as many as 18,000 to 20,000 people have been legally executed in the United States and the colonies.<sup>3</sup>

Under the English common law, which accompanied the migration to North America, capital punishment was mandatory for all defendants found guilty of murder.<sup>4</sup> Biblical sources prompted the early colonists to add idolatry, witchcraft and stubbornness in a child as subject to the penalty.<sup>5</sup>

Pennsylvania Quakers initiated the movement to abolish the death penalty in America in the eighteenth century.<sup>6</sup> The effort resulted in the establishment of common law "degrees" of murder in 1794 and the elimination of the death penalty for all crimes except murder in the first degree, i.e., "willful, deliberate and premeditated killing."<sup>7</sup> Other jurisdictions continued to execute persons convicted of other felonies, such as burglary and rape.

Pennsylvania was apparently prepared to abolish the death penalty altogether in 1917, according to the Harrisburg Evening Bulletin.<sup>8</sup> However, an ammunition plant near Chester, Pennsylvania exploded under suspicious circumstances. The deaths caused by the explosion and the possibility of sabotage prompted lawmakers

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2. Hugo A. Bedau, *The Death Penalty in America* 3 (Oxford University, 3d ed 1982).

3. This number does not include illegal lynchings which may have resulted in death sentences had they gone to trial.

4. *Gregg v Georgia*, 428 US 153, 177 (1976) (citation omitted). In 1791, when the Eighth Amendment was adopted, the English "Bloody Code" still provided for death sentences for more than two hundred offenses. *Woodson v North Carolina*, 428 US 280, 289 (1976).

5. Michael Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment* 47 (Random House, 1973) (hereinafter "Cruel and Unusual").

6. Bedau, *The Death Penalty in America* at 4 (cited in note 2).

7. *Id.* For a time, William Penn had limited the crimes subject to capital punishment in early Pennsylvania to murder and treason. Meltsner, *Cruel and Unusual* at 47 n 4 (cited in note 5).

8. Meltsner, *Cruel and Unusual* at 53 (cited in note 5).

to keep the ultimate punishment.<sup>9</sup>

Between 1838 and 1846, Tennessee, Alabama and Louisiana authorized the first discretionary death sentences for murder.<sup>10</sup> In 1847, the Territory of Michigan abolished the death penalty for all crimes except treason, becoming the first English-speaking jurisdiction in the world to do so.<sup>11</sup> Wisconsin, Rhode Island, Maine and Minnesota soon followed suit.<sup>12</sup> However, it was only a general trend away from widespread imposition of the death penalty, and many of the states did not follow it (for example, New York executed 682 people between 1900 and 1963).<sup>13</sup> As executions continued on a large scale in some states while other states were abolishing the penalty, the conflicting opinions supporting and abhorring capital punishment became intense.

The early case of *Weems v United States*<sup>14</sup> provided an avenue of appeal to the courts. Paul Weems was convicted by a Philippine court of stealing 612 pesos by falsifying a cash book of the captain of the port of Manilla. He was sentenced to fifteen years of "hard and painful labor"<sup>15</sup> in prison, chained at the ankle and wrist, "perpetual absolute disqualification" of political rights<sup>16</sup> and life-long surveillance. The Supreme Court of the United States found this to be "cruel in its excess of imprisonment" and "unusual in its character."<sup>17</sup>

In the post-World War II period, perhaps because the clause in the Constitution is "progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlight-

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9. *Id.*

10. *Id.* at 10.

11. Amnesty International, *United States of America: The Death Penalty* 13 (London, 1987).

12. Amnesty International, *United States of America: The Death Penalty* at 13 (cited in note 11). In Minnesota, the death penalty was abolished after a hanging in St. Paul where the rope was too long. A journalist graphically recounted the fourteen-and-a-half minute strangulation under the headline: "Displayed His Nerve to the Very Last." Meltner, *Cruel and Unusual* at 62 (cited in note 5).

13. Amnesty International, *United States of America: The Death Penalty* at 10 (cited in note 11).

14. 217 US 349 (1910).

15. *Weems*, 217 US at 364.

16. *Id.*

17. *Id.* at 377. The case also notes that earlier appeals from state sentences under the Eighth Amendment were denied because it was felt at that time that the Eighth Amendment did not apply to the states.

*Weems* is also interesting for Justice McKenna's overview of the history of the "Cruel and Unusual" clause. Earlier law had permitted such punishments as whipping for wife beating and banishment and slavery for free blacks convicted of larceny. *Id.* at 378.

ened by a humane justice,"<sup>18</sup> the United States Supreme Court was asked again to examine the constitutional limits of the death penalty. This re-examination focused on the question of why certain classes of defendants were often sentenced to capital punishment while similarly situated defendants rarely received death sentences. This led to a public and judicial perception of the penalty's application as "arbitrary and capricious."<sup>19</sup>

As one example, consider that between 1908 and 1962, although fifty-five percent of those imprisoned in Virginia for rape were black, one-hundred percent of the men executed for rape<sup>20</sup> during that period were black.<sup>21</sup> Other studies showed an increased likelihood for "blue collar" offenders to receive capital sentences than for "white collar" defendants.<sup>22</sup> Many other egregious examples of inequitable and capricious application are well-documented.<sup>23</sup> Some grossly disproportionate examples of executions by race of offenders are:<sup>24</sup>

18. *Id.*, citing *Ex parte Wilson*, 114 US 417, 427 (1884), and *Mackin v United States*, 117 US 348, 350 (1885).

19. *Furman v Georgia*, 408 US 238 (1972) (plurality opinion). For example, out of 424 convicted murderers in Georgia eligible for the death penalty between July 1, 1964 and December 31, 1968, fourteen were sentenced to death (three percent). Meltsner, *Cruel and Unusual* at 183 (cited in note 5). In Maryland, although twenty-eight first degree murderers were convicted between July 1, 1965 and June 30, 1966, only four were given capital sentences (fourteen percent). *Id.* And in Texas between 1946 and 1968, 5,034 persons were convicted of murder and 139 (two percent) were sentenced to death. *Id.*

20. Execution for the rape of an adult woman was held unconstitutional as grossly disproportionate to the crime in *Coker v Georgia*, 433 US 584 (1977) (plurality opinion). This proportionality requirement was recently removed for all sentences other than the death penalty. *Harmelin v Michigan*, US , 111 S Ct 2680 (1991). See also note 85 and accompanying text.

21. Note, *Capital Punishment in Virginia*, 58 Va L Rev 97, 114 (1972). Similarly, since 1930, Georgia has executed fifty-eight blacks and three whites for rape. See Brief for Petitioner at 1b, *Jackson v Georgia*, 408 US 238 (1972).

22. William J. Bowers, *Legal Homicide: Death as a Punishment in America, 1864-1982* at 213-14 (Northeastern University Press, 1984).

23. See Marvin E. Wolfgang and Marc Reidel, *Race, Judicial Discretion and the Death Penalty* in 407 *The Annals of the American Academy of Political and Social Science* at 119-33 (1973). See also *Lockett v Ohio*, 348 US 586 (1978) (plurality opinion), a leading case in which the defendant was sentenced to death despite the fact that she was the driver of the getaway vehicle. Sandra Lockett had never entered the store during the robbery/murder. Her co-defendant, the triggerman, received a life sentence after a plea bargain. The case was remanded.

24. Cited in Amnesty International, *United States of America* passim (cited in note 11).

		<u>Blacks</u>	<u>Whites</u>
Alabama	1927-1962	205	33
Georgia	1924-1964	340	82
North Carolina	1901-1961	286	76
South Carolina	1912-1962	194	74

The execution of blacks for committing the same crimes as whites, who were not executed, is one example of how the death penalty was assigned arbitrarily and capriciously, in part evidencing jury motivations of passion and prejudice.<sup>25</sup> The re-examination of criteria that states applied in capital sentencing cases led to a large body of constitutional attacks focusing on the "cruel and unusual punishment" clause of the Eighth Amendment.<sup>26</sup> The argument was made that the death penalty is "cruel and unusual" because of seemingly random application to similarly situated criminals.<sup>27</sup> Early precedent had established that the Eighth Amendment must be construed and applied to reflect the evolving moral standards of the country.<sup>28</sup>

The seminal modern case reflecting contemporary constitutional boundaries is *Furman v Georgia*.<sup>29</sup> The Court noted that unclear standards in the law were allowing "arbitrary" and "capricious"

25. *Furman*, 408 US 238 (1972) (plurality opinion).

26. The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." US Const, Amend VIII. The Eighth Amendment is applicable to the states by incorporation into the Fourteenth Amendment. *California v Robinson*, 370 US 660 (1962). For an early example of an attack on the death penalty based on the Eighth Amendment, see *Louisiana v Resweber*, 329 US 459, 466 (1947) (Frankfurter concurring). Willie Francis received a tremendous jolt of electricity in Louisiana's electric chair but survived it. Four justices found a second attempt to execute to be constitutional since the botched attempt was merely an accident and not an attempt by the state to inflict unnecessary pain. *Resweber*, 329 US at 463-64. Four other justices found this to be a lack of civilized conduct intended to be prohibited by the Eighth Amendment. *Id.* at 479. Frankfurter's opinion concluded it would be an imposition of his personal views on what was uncivilized on the people of Louisiana.

27. The Legal Defense Fund, in briefs submitted as amicus curie in *Boykin v Alabama*, 395 US 238 (1969), argued that, as applied to robbery, the death penalty was applied as randomly as a roll of the dice. Meltsner, *Cruel and Unusual* at 182 (cited in note 5). Since over 200,000 robberies were known to the police in 1967, it was argued that the few selected for capital punishment were "freakishly" selected. *Id.*

28. See, for example, *Weems*, 217 US at 378; *Trop v Dulles*, 356 US 86, 100 (1958) (plurality opinion) (the Eighth Amendment's purpose is to assure that punishment is "exercised within the limits of civilized standards"); *Gregg v Georgia* 428 US 153 (1976); and *Woodson v North Carolina*, 428 US 280 (1976). This allows for a flexibility in interpretation allowing conformity to contemporary standards as measured by the Court.

29. 408 US 238 (1972). *Furman* was convicted of murder under a Georgia statute which did not require specific jury determinations about either the circumstances or the character of the defendant.

sentences to be imposed by juries and declared that legislative guidance must be provided to prevent "wantonly" or "freakishly" imposed death penalties.<sup>30</sup> Justice Douglas wrote that "it would seem incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices" and therefore cannot withstand constitutional scrutiny.<sup>31</sup> The *Furman* Court further stated that the class of death-eligible defendants must be narrowed to bridle jury discretion. This decision effectively invalidated all of the existing death penalty statutes of the various states and commuted the sentences of those sentenced under the invalid statutes.<sup>32</sup> It also spawned a plethora of litigation as the Court has subsequently struggled to define the extent of legislative guidance required and the extent of legislative guidance permitted by the Constitution to bridle jury discretion.

The first major group of cases to reach the United States Supreme Court following revision of the states' death penalties included *Gregg v Georgia*.<sup>33</sup> *Gregg* upheld the imposition of a death sentence under a Georgia statute, which had been revised after *Furman*, for a murder which occurred during an armed robbery.<sup>34</sup> The statute provided that mitigating circumstances be considered on automatic appeal to the Georgia Supreme Court and directed

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30. *Furman*, 408 US at 310 (Stewart concurring). "There is no meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not." Id at 313 (White concurring).

31. Id at 242-43 (Douglas concurring), citing the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken.

32. Retroactivity on collateral review is no longer a part of Supreme Court jurisprudence. *Teague v Lane*, 489 US 288 (1989). See also *Penry v Lynaugh*, 492 US 302 (1989) (remand with instructions that the trial court admit evidence of defendant's mental retardation was not a retroactive rule). Non-retroactivity is peculiar in this context, since it seems to run counter to the expressed deference to evolving moral standards.

33. 428 US 153 (1976). *Gregg* was convicted of two counts of robbery and two counts of murder.

34. The *Gregg* Court determined that the death penalty is not per se cruel and unusual. *Gregg*, 428 US at 187 (the original intent of the clause was primarily to prohibit tortures and other "barbarous" punishments). See also Anthony Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 Cal L Rev 839, 855-56 (1969). When the Eighth Amendment was adopted, it was accepted practice in America to punish by public whipping, notching the ear of an offender, or even placing a brand on the cheek to facilitate future recognition. Meltsner, *Cruel and Unusual* at 171 (cited in note 5). *Profitt v Florida*, 428 US 242 (1976), decided the same day, held constitutional a system which directed the judge and advisory jury to consider certain enumerated mitigating circumstances. An advisory jury acts as an ordinary jury, but the court is only guided by and not bound by the jury's determination.



that, if the sentence was affirmed, the Georgia court must include in its decision reference to similar cases it had considered.<sup>35</sup> The United States Supreme Court determined that this statute satisfied the standard that the "penalty must accord with the dignity of man which is a basic concept underlying the Eighth Amendment."<sup>36</sup> *Gregg* thus settled the question unanswered by *Furman*: had the death penalty become per se cruel and unusual under the evolving moral standards which set the limits of the Eighth Amendment? From *Gregg* until the present, the answer has been, "no."<sup>37</sup>

*Gregg*<sup>38</sup> was decided the same day as *Woodson v North Carolina*.<sup>39</sup> *Woodson* struck down as unconstitutional a statute imposing mandatory death penalties for all first degree murders.<sup>40</sup> The

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35. *Gregg*, 428 US at 204-05. The Georgia statute provided:

(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart . . . .

Ga Code Ann § 26-1101 (Michie, 1972).

The sentencing statute specified aggravating circumstances for which the death penalty may be imposed for the crimes of treason, aircraft hijacking, murder, rape, armed robbery and kidnapping. The statute required the judge to "include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the [ten] statutory aggravating circumstances which may be supported by the evidence." Ga Code Ann § 27-2534.1(b) (Supp 1975).

36. *Gregg*, 428 US at 173, citing *Trop v Dulles*, 356 US 100 (1958) (plurality opinion).

37. "Although this issue [whether the death penalty is per se cruel and unusual] was presented and addressed in *Furman*, it was not resolved by the Court." *Gregg*, 428 US at 169.

38. *Gregg* was decided as an Eighth Amendment case, but it apparently applied a due process analysis. "There is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Furman*, 408 US at 313 (White concurring). "For, of all the people convicted of [capital crimes], many just as reprehensible as these . . . . "Id at 309-10 (Stewart concurring). Also, "the decisive grievance of the opinions . . . is that the present system of discretionary sentencing in capital cases has failed to produce even-handed justice." Id at 398-99 (Burger dissenting).

39. 428 US 280 (1976). *Woodson* and three others killed a convenience store clerk and seriously wounded a customer in the course of a robbery. The mandatory statute under which they were sentenced read:

Murder in the first and second degree defined; punishment. —A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death . . . .

NC Gen Stat § 14-17 (Cum Supp 1975).

40. *Woodson* discussed a history of cases criticizing automatic death sentences dating

Court reasoned that the "two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society—jury determinations and legislative enactments—conclusively point to the repudiation of automatic death sentence."<sup>41</sup> In sum, the Constitution after *Woodson* requires "individualized" sentencing, not automatic penalties which do not consider the particular person and circumstances of the offense.<sup>42</sup>

The mandatory death penalty in *Woodson* "was held invalid because it permitted no consideration of relevant facets of the character and record of the individual offender or the circumstances of the particular offense."<sup>43</sup> The Court extended this requirement in *Lockett v Ohio*<sup>44</sup> to mandate that a sentencer must be allowed to consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."<sup>45</sup>

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from *Winston v United States*, 172 US 303 (1899). *Woodson*, 428 US at 296-97. For other instances where the Court found automatic imposition of the death penalty unconstitutional, see *Roberts v Louisiana*, 428 US 325, 333-34 (1976) (opinion of Stewart, Powell and Stevens) (automatic death sentence for intentional killing in the course of certain enumerated felonies); *Sumner v Shuman* 483 US 66, 85 (1987) (automatic death penalty for prisoner who commits murder while serving a life sentence); *Roberts v Louisiana*, 431 US 633, 637 (1977) (automatic death sentence for the murder of a police officer).

41. *Woodson*, 428 US at 280.

42. *Id.* citing *Williams v New York*, 337 US 241, 247 (1949).

43. *Lockett v Ohio*, 439 US 586, 604 (1978) (plurality opinion) (emphasis in original). See also *McKoy v North Carolina*, 494 US 433 (1990), which vacated a sentence imposed where the jury was required to find mitigating circumstances unanimously, and *Mills v Maryland*, 486 US 367 (1988), which held a death penalty statute unconstitutional where there was an unproven possibility that the jury may have felt it could not give consideration to all mitigating circumstances. There was no showing in *Mills* that the jury actually misperceived its ability to consider mitigating circumstances, but there was a "substantial risk." *Mills*, 486 US at 381.

44. 348 US 586 (1978).

45. *Lockett*, 348 at 604 (emphasis and footnote omitted). See also *Eddings v Oklahoma*, 455 US 104, 117 n 13 (1982) (O'Connor concurring). Monty Lee Eddings was a sixteen-year-old runaway who was travelling in a car owned by his brother when the car was pulled over by a police officer. Eddings killed the officer with a shotgun. The trial court considered the aggravating circumstances offered by the prosecution but refused to recognize any of the evidence offered in mitigation. In reversing, Justice Powell wrote, "Failure to consider all the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett* . . ." Eddings was sixteen years old, *Eddings*, 455 US at 104, emotionally disturbed, *id.* at 107, beaten by a "harsh father," *id.*, and had an unhappy upbringing in a turbulent family, *id.* State courts refused to allow the jury to consider any of these factors as mitigating, but the United States Supreme Court remanded, holding that Eddings must be permitted to introduce the evidence and the jury must be allowed to weigh it. *Id.* at 117.

This requirement that all mitigating evidence be permitted to be given effect at the sentencing stage was recently balanced by the prosecution's ability to introduce evidence of the

This dichotomy of aggravating and mitigating circumstances is not so rigid that it precludes other schemes designed to achieve similar effect. In *Jurek v Texas*,<sup>46</sup> the United States Supreme Court upheld a statute which prescribed consideration of five aggravating circumstances and, as interpreted by the Texas courts, allowed consideration of mitigating circumstances by focusing on the particularized circumstances of the individual offender.<sup>47</sup>

Dictum in *Jurek* stated that although the consideration of only aggravating circumstances would "almost certainly fall short of providing the individual sentencing determination . . . required by the Eighth and Fifth Amendments [by approaching] mandatory laws," the Texas statute survived scrutiny.<sup>48</sup> The distinction which saved the *Jurek* statute was that, *as applied*, the Constitution was satisfied because the statute permitted consideration of "all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed."<sup>49</sup>

These cases elaborately elucidated the "evolving moral standard" prescribed by *Weems*. The purpose of the constitutional limits has been stated as the requirement that a state "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."<sup>50</sup>

Although death penalty review cases have been decided in the face of vehement dissent, the two minimal standards seemed well established: the Constitution requires limiting jury discretion by narrowing the class of death-eligible defendants in a rational manner (to provide an individualized sentence), and a sentencer must be allowed to consider and give effect to all mitigating factors

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"impact" of a murder on the surviving family members. *Payne v Tennessee*, US , 111 S Ct 2597 (1991).

46. 428 US 262 (1976).

47. *Jurek*, 428 US at 272-73. This statute requires a sentencer to assess the probability that the defendant will constitute a "continuing threat to society." *Id* at 272. The Texas Court of Criminal Appeals interpreted this to allow the defendant to present mitigating circumstances. *Id*.

48. *Id* at 271.

49. *Id*.

50. *Zant v Stephens*, 462 US 862, 877 (1983). The Court stated, "Statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty." *Zant*, 462 US at 878.

*Zant*, however, upheld a conviction pursuant to a Georgia statute under which "the finding of an aggravating circumstance [did] not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." *Id* at 874.

before imposing the death penalty.<sup>51</sup>

Narrowing the class of death-eligible defendants as required by the Constitution has, since *Gregg*, been accomplished by the use of "aggravating circumstances."<sup>52</sup> The determination of what constitutes aggravating circumstances has been left to the discretion of the state legislatures.<sup>53</sup>

A tension then exists between a state's legislative prerogative and its strong interest in a capital sentencing proceeding in having the jury "express the conscience of the community on the ultimate question of life or death."<sup>54</sup> Although the legislature must define who is eligible for imposition of the death penalty, it is the jury which must have the ultimate responsibility for sentencing.<sup>55</sup>

The subtle interplay necessitates a balancing of powers not only between the legislative and judicial branches, but also between the state and federal governments. If the states determine that the effectiveness of their police powers requires that certain classes of murderers be subject to the death penalty, to what extent may the federal Constitution limit the states' implementation?

The United States Supreme Court, under its constitutional prerogative,<sup>56</sup> has asserted control. Among the recent cases which

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51. *McCleskey v Kemp*, 481 US 279 (1987).

52. *Zant*, 462 US at 877. See also *Godfrey v Georgia*, 446 US 420 (1980). "Aggravating factors" found at the sentencing stage can be used to distinguish the murder from all other murders, thus narrowing the class of death-eligible defendants. *Godfrey*, 446 US at 428-29.

53. See *Lowenfield v Phelps*, 484 US 231, 244 (1988), and *Jurek*, 428 US at 270. Lowenfield was convicted under a Louisiana statute wherein an aggravating circumstance was defined in the same manner as an element of the crime. First degree murder occurred where "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person." La Rev Stat Ann § 14:30.A.(3) (West 1986). The sole aggravating circumstance found was that "the offender knowingly created a risk of death or great bodily injury to more than one person." La Crim Proc Code Ann art 905.4(d) (West 1984). Lowenfield was convicted of two counts of manslaughter and three counts of first degree murder after he killed a woman with whom he had lived, three members of her family, and one of her male friends.

54. *Witherspoon v Illinois*, 391 US 510, 519 (1968). *Witherspoon* concerned the propriety of excluding persons from the jury who admitted to having "conscientious or religious scruples" against the infliction of the death penalty. *Witherspoon*, 391 US at 522. It was concluded that the jury was therefore not impartial, so that the sentencing scheme violated the Due Process Clause. *Id* at 523. This is the so-called "death qualified" jury. *Id* at 517.

55. *Lowenfield*, 484 US at 246. There are two alternative ways in which the legislature may perform the narrowing function: "The legislature may itself narrow the definition of capital offenses . . . so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase." *Id* at 231.

56. The Court established itself as the final interpreter of the Constitution in *Marbury v Madison*, 5 US 137 (1803). The Court's power over state legislatures flows from Arti-

show a marked shift in the Court's attitude towards the death penalty, one of the most remarkable comes out of Pennsylvania.<sup>57</sup>

### *BLYSTONE V PENNSYLVANIA: THE BURDEN SHIFTS*

Scott Wayne Blystone drove his girlfriend and another couple down a Pennsylvania road in September, 1983. A Pennsylvania jury later determined that this road was the road to the electric chair for Blystone.

On the evening of the crime, Blystone's vehicle was low on gas and the occupants were low on resources. A hitchhiker, Carlton Charles Smithburger, Jr., was immediately targeted by Blystone for a robbery to which his friends acquiesced. Blystone picked up Smithburger, a man who was characterized at trial as having a learning disability, and asked him if he had any money to contribute for gas. Smithburger replied that he had only a few dollars and was searching his pockets when Blystone produced a revolver and held it against Smithburger's head.

Blystone then ordered Smithburger to close his eyes and put his hands on the dashboard while he pulled the car off the road. Blystone told his victim to get out of the car and into a field where he searched Smithburger at gunpoint. Smithburger's pockets on that Friday night yielded just thirteen dollars. He was ordered to lie face down in the field, where he lay shaking. Blystone went back to the car to tell his companions he intended to kill Smithburger.

Returning to his victim, Blystone knelt on Smithburger's back and held the gun to his head. He asked for a description of the car. Unfortunately, Smithburger accurately described the distinctive green car with the wrecked back end. Blystone said, "Goodbye," and shot six bullets into the back of Smithburger's head.

A subsequent conversation, recorded in grisly detail by use of a concealed wire worn by an acquaintance of Blystone during lunch at a Burger King, left the jury with no reasonable doubt as to Blystone's guilt.<sup>58</sup> During the conversation, Blystone recounted re-

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cle VI, Section 2 of the Constitution (the Supremacy Clause).

57. *Blystone v Pennsylvania*, 494 US 299 (1990). Many of the facts of *Blystone* recounted here are taken from the opinion of the Pennsylvania Supreme Court in *Commonwealth v Blystone*, 519 Pa 450, 549 A2d 81 (1988).

Subsequent to Blystone's sentencing, Pennsylvania has replaced its electric chair with death by lethal injection. 61 PS § 2121.1, Pub L 572, Nov 29, 1990.

58. *Blystone*, 549 A2d at 84. The tape as transcribed at trial is appended to the Pennsylvania Supreme Court opinion, although that court stated the testimonial evidence of Blystone's associates along with the physical evidence would have been sufficient to support a conviction. *Id.*

turning to the scene of the murder to retrieve a pack of the victim's cigarettes, which had Blystone's fingerprints on them (he smoked the bloodstained cigarettes).<sup>59</sup> This mission to retrieve the cigarette pack, which he felt contained betraying fingerprints, included a surreal playacting scene performed by Blystone and an accomplice for the benefit of non-existent police who might be hiding in the bushes. This bizarre scene culminated in the discovery of the cigarettes under the mutilated body of Smithburger, which was described in nonchalant detail over lunch by the murderer.

The wiretap captured Blystone asserting that "getting away with [murder is] very easy" and that murder is "a real f—g experience. It's wild." He believed he was wearing the same jeans at lunch that day that he had worn on the murderous night. Blystone recounted how his girlfriend laughingly picked a piece of the victim's brain from his face, played with it, and threw it in the ashtray of the car. He confided, "It don't make you feel bad. . . . We laugh about it."

In a 5-4 decision, the United States Supreme Court upheld the mandatory aspects of the Pennsylvania death penalty statute.<sup>60</sup>

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59. *Id.* at 97. Justice Stevens, at oral argument, uncharacteristically breached judicial decorum to comment that Blystone is "not a very nice man."

60. *Blystone*, 494 US 299 (1990). The Pennsylvania statute reads in pertinent part: "The verdict *must* be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance." 42 Pa Cons Stat Ann § 9711(c)(iv) (Purdon 1988) (emphasis added).

The aggravating circumstances are enumerated as:

- (1) The victim was a fireman, peace officer, or other public servant concerned in official detention . . . , who was killed in the performance of his duties.
- (2) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.
- (3) The victim was being held by the defendant for ransom or reward, or was held as a shield or hostage.
- (4) The death of the victim occurred while the defendant was engaged in the hijacking of an aircraft.
- (5) The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.
- (6) The defendant committed the killing while in the perpetration of a felony.
- (7) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.
- (8) The offense was committed by means of torture.
- (9) The defendant has a significant history of felony convictions involving the use or threat of violence to the person.
- (10) The defendant has been convicted of another Federal or State offense committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was impossible or the defendant was undergoing a sentence of life

From a purely human perspective, the extreme callousness, vulgarity and "feeling of power" Blystone manifested in this taped conversation made his case a most unsympathetic one for a constitutional challenge. Viewed from a perspective of pure legal analysis, however, the *Blystone* case was the perfect test for determining the legislature's ability to define capital crimes.

Blystone's sole legal aggravating circumstance was the thirteen dollar robbery. For whatever reason, he refused to offer a single mitigating circumstance.<sup>61</sup> Pennsylvania law provides for automatic, direct appeal to the state's supreme court in cases imposing the death penalty. Blystone argued to the state's highest court that the death penalty statute was unconstitutional because it mandated a sentence of death based on the outcome of the weighing process of aggravating versus mitigating circumstances. The same jury which found the aggravating circumstance, it was argued, was therefore foreclosed in the bifurcated sentencing stage from imposing any sentence other than death.<sup>62</sup> Since the jury had found Blystone guilty of robbery, an aggravating circumstance, and since there were no mitigating circumstances, the statutory language mandated that, when aggravating circumstances outweigh mitigating circumstances, "the verdict must be a sentence of death."<sup>63</sup>

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imprisonment for any reason at the time of the commission of the offense.

(11) The defendant has been convicted of another murder, committed either before or at the time of the offense at issue.

(12) The defendant has been convicted of voluntary manslaughter . . . committed either before or at the time of the offense at issue.

42 Pa Cons Stat Ann § 9711(d) (Purdon 1988).

Further aggravating circumstances have been added after *Blystone*.

61. *Blystone*, 494 US at 302. Pursuant to the statute, the jury was instructed that it was free to find any mitigating circumstances even though, contrary to warnings from the trial judge and advice from defendant's counsel, none were offered. While aggravating circumstances must be found unanimously by the jury in the weighing process to vote life or death, individual jury members may consider mitigating circumstances not considered mitigating by the other jurors. 42 Pa Cons Stat Ann § 9711(e) (Purdon 1988). The jury found no mitigating circumstances from the evidence. *Blystone*, 494 US at 302. This catch-all provision of the statute apparently is necessary to withstand constitutional scrutiny. Limiting the introduction of mitigating circumstances has provided grounds for reversal in several instances. See, for example, *Woodson*, 428 US 280 (1976); *Skipper v South Carolina*, 476 US 1 (1986) (the trial court had excluded as irrelevant evidence that the defendant had adjusted well to prison life); and *Eddings v Oklahoma*, 455 US 104 (1982) (jury must be allowed to consider defendant's mental retardation).

62. *Blystone*, 549 A2d at 92. A separate sentencing hearing is required by the statute for those convicted of first degree murder. 42 Pa Cons Stat Ann § 9711(a) (1988). This comports with the language of *Gregg*, 428 US at 191-92, which stated that a bifurcated process is "more likely to ensure elimination of the constitutional deficiencies identified in *Furman*."

63. 42 Pa Cons Stat Ann § 9711(c)(iv). The text of the statute is set forth in note 60.

Based on precedent, both at the state level<sup>64</sup> and the decisions of the United States Supreme Court,<sup>65</sup> the Pennsylvania Supreme Court summarily rejected Blystone's argument. Certiorari was granted by the United States Supreme Court. Writing for the majority, Chief Justice Rehnquist stated that the statute satisfied the requirement that all types of mitigating circumstances may, at the jury's discretion, be considered. Of more reaching significance was the Court's holding that the statute is not impermissibly mandatory. That is, the Court found that death is imposed only "after a determination that the aggravating circumstances outweigh the mitigating circumstances . . . or that there are no such mitigating circumstances."<sup>66</sup> It is this second holding which is likely to have far collateral consequences.

The majority opinion summarized the current state of constitutional jurisprudence applicable to the death penalty as consisting of a twofold analysis: first, a threshold requirement must consist of legislatively enumerated "rational criteria which narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet that threshold."<sup>67</sup> This threshold is further controlled by a "societal consensus" that if a penalty is disproportionate to a particular offense, the state is prevented from imposing the death penalty for that offense.<sup>68</sup> Second, the

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64. *Commonwealth v Peterkin*, 511 Pa 299, 513 A2d 373 (1986). Peterkin was sentenced to death for the shooting of two persons during a service station robbery. Peterkin's challenge to the constitutionality of the Pennsylvania statute was that the mandatory language precluded a sentencing authority from granting mercy or leniency. The state supreme court held that the ability to introduce a broad range of mitigating evidence satisfied constitutional requirements. *Peterkin*, 513 A2d at 387-88.

65. *Furman v Georgia*, 408 US 238 (1972). *Furman* held that jury discretion must be channeled to avoid arbitrary and capricious capital sentencing. See also *Lockett v Ohio*, 438 US 586 (1978). *Lockett* mandated that a capital sentencing jury be allowed to consider all relevant mitigating evidence.

66. *Blystone*, 494 US at 305. The opinion cited as authority for this standard *Lockett*, 438 US 586 (1978), and *Penry v Lynaugh*, 492 US 302 (1989). Penry was a victim of child abuse who had organic brain disease and retardation giving him the mental age of a six-and-a-half year old. Penry was found guilty of capital murder in Texas. Jury instructions limited the mitigating circumstances which could be considered to effectively exclude these factors. The United States Supreme Court remanded because the same statute found constitutional in *Jurek* was now being applied in an unconstitutional manner. All relevant evidence which mitigates against imposing the death penalty must be allowed to go to the jury. *Penry*, 492 US at 328, citing *Eddings* and *Lockett*.

67. *Blystone*, 494 US at 308-09, citing *McCleskey v Kemp*, 481 US 279 (1987).

68. *Blystone*, 494 US at 308-09. The derivation of this consensus was elucidated in *Gregg*, 428 US at 179-81 (opinion of Stewart, Powell, and Stevens). The Court evaluated several factors. The enactments of legislative bodies are considered to be of primary importance. The *Gregg* Court also cited California and Massachusetts referenda authorizing capi-



state cannot channel the sentencer's discretion in a way which prevents the consideration of any relevant information offered by the defendant.<sup>69</sup>

Blystone's jury, having made requests for clarification from the court of what constitutes a mitigating circumstance (after just thirty minutes of deliberation),<sup>70</sup> found none in the record on its own.<sup>71</sup> The jury may have rejected the possibly mitigating inference that the offering of no mitigating circumstances indicated a newfound remorse, or it may have rejected that conclusion due to the recorded "confession."<sup>72</sup> At that point, because of the mandatory language of the statute, the jury was helpless to save the life of Blystone.<sup>73</sup> The United States Supreme Court found that Pennsylvania's statute fell within the "permissible" range of discretion.<sup>74</sup>

#### PAYNE, PAIN, AND PAYING

Another very recent case produced an even more radical shift in Eighth Amendment jurisprudence. In *Payne v Tennessee*,<sup>75</sup> the defendant had been refused sex in the apartment of a twenty-nine year old woman. He removed a butcher knife from a kitchen

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tal punishment. *Id.* at 181. It was further stated that the "jury is also a significant and reliable objective index of contemporary values because it is so directly involved." *Id.*

It should be noted that different states' legislatures may reach their own determination of a societal consensus by virtue of an institutional advantage over the Court in fact finding.

69. *Blystone*, 494 US at 309.

70. Brief for Appellant at 16. *Blystone*, 494 US at 312 n 3 (Brennan dissenting).

71. *Blystone*, 494 US at 311 n 2 (Brennan dissenting).

72. The trial judge emphasized in his instructions to the jury that the defendant must prove mitigating circumstances by a preponderance of the evidence. *Id.* at 312 n 3 (Brennan dissenting). This is a correct reading of 42 Pa Cons Stat Ann § 9711(e)(1)(iii) (Purdon 1988).

73. One fundamental flaw that seems apparent to this author is the simple dichotomy of the aggravating and mitigating circumstances. Aggravating circumstances are specifically enumerated and carry with them the weight of legislative enactment. The jury's own discretion, factored by their self-doubt stemming from unfamiliarity with the system, will determine the mitigating factors. It is analogous to a civil jury weighing negligence per se and contributory negligence.

74. Dissenting were Justices Brennan and Marshall, joined in part by Justices Stevens and Blackmun. The dissenters reasoned that the mandatory aspects of the statute give control of the ultimate decision over whether the death penalty is appropriate to the legislature when the decision is properly within the domain of the jury. The judge instructed the jury that once it found an aggravating circumstance and no mitigating circumstances, "It is your duty to return a verdict of death." This, the dissent stated, was the first time the Court allowed such legislation to survive constitutional scrutiny. *Blystone*, 494 US at 324 (Brennan dissenting).

75. 111 S Ct 2597 (1991).

drawer and stabbed the woman, her three-year-old son and her two-year-old daughter. Although stabbed completely through the body, the boy miraculously survived. His mother and sister were killed.

The prosecutor introduced testimony by the boy's grandmother that he asked about his mother's whereabouts on a daily basis. The boy often said he missed his (baby sister) Lacy. The prosecutor told the jury that there was no one to look out for Lacy. She would never go to the prom or play with her brother. The boy would never again be kissed by his mother and tucked into bed and sung a lullaby. The prosecutor even conjured the image of the brave, wounded little boy holding his intestines in with his hand while being taken to an ambulance.

After this, the "death qualified"<sup>76</sup> jury of course sentenced Payne to die for the crime. The United States Supreme Court, reversing two established precedents<sup>77</sup> by calling them "wrongly decided," upheld the constitutionality of introducing "victim impact" evidence. It reasoned that a fair trial where any defendant can introduce *any* mitigating evidence produces an unequal burden on the prosecution and so requires a balancing. This balancing is accomplished, after *Payne*, by permitting the jury to consider the impact of the crime on survivors when weighing "blameworthiness" of the murderer.<sup>78</sup> While a majority of people may support

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76. "Death qualified" juries are described above in note 54. See also, for example, *Sumner v Shuman*, 483 US 66 (1987), and *Gregg*, 428 US at 189-95.

77. *Booth v Maryland*, 482 US 496 (1987); *South Carolina v Gathers*, 490 US 805 (1989). In *Booth*, the statute required the presentment of a victim impact statement (hereinafter "VIS") in all felony cases. This VIS was required to include, among other things, any "information related to the impact of the offense upon the victim or the victim's family that the trial court requires." Md Ann Code art 41, § 4-609(c)(3) (1986). *Booth*, apparently to steal money to buy heroin, robbed an elderly couple who were his neighbors. He stabbed them to death to prevent them from identifying him. *Booth*, 482 US at 497-98.

In *Gathers*, the defendant and three others assaulted a man sitting on a park bench. The victim was severely beaten, struck over the head with a bottle, and pummeled with an umbrella which was then inserted into his anus. Sometime later, Gathers returned to stab the victim with a knife. The victim considered himself a preacher and referred to himself as "Reverend Minister." The prosecutor introduced the contents of religious tracts the victim had been carrying on that night and the jury sentenced Gathers to death. The South Carolina Supreme Court reversed based on the fact that the knowledge that the victim was a religious man suggested that Gathers deserved to die. While the United States Supreme Court recognized that the scattering of these papers was relevant to the crime, the content of the religious tracts, it ruled, was not relevant. *Gathers*, 490 US at 811. Justice White concurred, simply stating, "Unless *Booth* . . . is to be overruled, the judgment below must be affirmed." *Id* at 812.

78. A murderer will apparently be much more likely to receive the death penalty if his victim is established in the community as opposed to, say, a homeless person or an

the introduction of victim impact statements at this time,<sup>79</sup> it is a marked shift from the predisposition to mercy historically embodied in our system.<sup>80</sup>

Another example of the Supreme Court's eroding protections of the individual is seen in the newfound ability to execute the mentally retarded.<sup>81</sup> The United States Supreme Court has found that there is no constitutional barrier to imposing the death sentence on the mentally retarded in the recent case of *Penry v Lynaugh*.<sup>82</sup>

Those who were considered incompetent had a defense even under the common law. Sir Edward Coke wrote, "By intendment of Law the execution of the offender is for example . . . but so it is not when a mad man is executed, but should be a miserable spectacle, both against law and of extream inhumanity and cruelty, and can be no example to others."<sup>83</sup> The Americans followed this rule. Blackstone wrote, "If a man of sound memory commits a capital offense, and before arraignment for it becomes mad, he ought not

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elderly person whose friends have largely preceded him. Thus while it may be true that no man is an island, some are connected to mankind by more tenuous ground than the rest. Therefore, a logical killer who bases his actions to some degree on potential punishment will kill the unloved (or less loved) whose life is now somehow intrinsically less valuable to society regardless of other contributions.

79. Recall the particular relish of the crowd gathered at the Florida execution site of mass murderer Ted Bundy. People pretending to roast marshmallows and holding signs reading, "Too bad Ted, you're dead," displayed a mindless sort of mob vengeance. Compare, *Gregg*, 428 US at 173 ("Public perceptions of standards of decency with respect to criminal sanctions are not conclusive").

80. In a federal case where there was the mere possibility that the jury could misinterpret the law, a previous Court stated, "In death cases, doubts such as those presented here should be resolved in favor of the accused." *Andres v United States*, 333 US 740, 752 (1948). See also *Mills v Maryland*, 486 US 367 (1988) (possibility that the jury would misinterpret their ability to consider all relevant mitigating evidence required remand).

Mr. Justice Marshall did not go gentle into that goodnight. His dissent from *Payne* stated, "Enforcement of the Bill of Rights and the Fourteenth Amendment frequently requires this Court to rein in the forces of democratic politics, this Court can legitimately lay claim to compliance with its directives only if the public understands the Court to be implementing 'principles . . . founded in the law rather than in the proclivities of individuals.'" *Payne*, 111 S Ct at 2623-24 (citation omitted). Justice Marshall further raged that the Court's "campaign to resurrect yesterday's 'spirited dissents' will squander the authority and legitimacy of this Court. . . ." *Id* at 2625.

81. See, for example, *Ford v Wainwright*, 477 US 399 (1986) (Eighth Amendment prohibits state from inflicting the death penalty upon a prisoner who is insane); *Eddings v Oklahoma*, 455 US 104 (1981) (jury must be allowed to consider mitigating evidence of mental retardation and organic brain disease). See also Note, *Insanity of the Condemned*, 88 Yale L J 533 (1979).

82. 492 US 302 (1989).

83. Edward Coke, 3 *Institutes* 6 (6th ed 1680). Refusing to execute the incompetent in some ways vindicates all criminal law because those who are punished are acknowledged to be responsible for their acts.

to be arraigned for it.”<sup>84</sup> Our “contemporary standards” will no longer protect the incompetent when members of society cry out for vengeance.

In another example, the Supreme Court has also turned from the path of precedent in holding that the “eighth amendment contains no proportionality guarantee”<sup>85</sup> between the crime and the sentence imposed. In *Harmelin v Michigan*,<sup>86</sup> the Court allowed a Michigan judgment to stand which sentenced a Ronald Harmelin to life in prison with no possibility of parole. The defendant was a first-time offender and was convicted of possession with intent to deliver cocaine. Recall that as early as 1910 the Court in *Weems* had held the opposite (i.e., that disproportionate sentences were both cruel and unusual).

Following the *Weems* precedent, the *Gregg* Court explicitly stated that “public perceptions of standards of decency are not conclusive . . . . This means, at least, that the punishment not be ‘excessive’.”<sup>87</sup> Excessive punishments were also condemned in *Furman*. That Court, looking to ancient sources, stated: “Excessive amercements became so prevalent that three chapters of the Magna Carta were devoted to their regulation.”<sup>88</sup> The Barons of Runnymede echo a far cry from the Justices of *Harmelin*.<sup>89</sup> The protections enjoyed since 1215 became a memory in 1991 as the United States Supreme Court bowed to public pressure against crime in general and drug crime in particular.<sup>90</sup>

84. William Blackstone, 4 *Commentaries* 24-25 (1783).

85. *Harmelin v Michigan*, US , 111 S Ct 2680 (1991).

86. 111 S Ct 2680 (1991). Justice Scalia wrote for the plurality (himself and Chief Justice Rhenquist) and concluded after a long examination of history that there is no proportionality review except with respect to death sentences, because the protection against “cruel and unusual” punishments was originally intended to limit judges and not the legislature. *Harmelin*, 111 S Ct at 2691. Justice Kennedy (concurring with Justices O'Connor and Souter) found a narrow proportionality review which is not confined to death penalty cases. Id at 2702-03 (Kennedy concurring) (relying on *stare decisis* of the last eighty years).

87. *Gregg*, 428 US at 173. The Court stated that, as applied to abstract punishments (such as the death penalty) as opposed to particular punishments (as applied to a specific defendant for a specific crime), “excessive” punishment analysis has two aspects. First, not unnecessary and wanton infliction of pain and second, the punishment must not be grossly disproportionate to the crime. Id (citations omitted).

88. *Furman*, 408 US at 243.

89. More recently, the Supreme Court held a life sentence without possibility of parole for the crime of recidivism based on seven underlying nonviolent felonies to be a violation of the Eighth Amendment. *Solem v Helm*, 463 US 277 (1983).

90. Peculiarly, on his way to finding no original intent to require proportionality of sentencing, Justice Scalia quoted Patrick Henry urging the adoption of a bill of rights in Virginia: “What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment.” *Harmelin*, 111 S Ct at 2694.

It is possible that those members of the Court who narrowly adhere to precedent and find proportionality review mandated by the Eighth Amendment will have to reexamine their views, given the lack of textual distinction between capital punishments and other punishments. Ronald Harmelin was, after all, sentenced to death in prison for his drug possession.

### JUDICIAL EROSION OF EIGHTH AMENDMENT RIGHTS—IS THERE A LIMIT?

Individualized sentencing has, prior to *Blystone*, required the consideration of the weight of *both* the aggravating *and* the mitigating circumstances when choosing whether to impose a death sentence.<sup>91</sup> The weight of an aggravating circumstance is equally as relevant to the propriety of the death penalty as the weight of any mitigating circumstance when making the required "reasoned moral response."<sup>92</sup>

Enumeration in a statute of aggravating circumstances precludes any moral judgment about the particular act or the actor.<sup>93</sup> In this respect, the jury is precluded from fulfilling its proper function of determining whether it believes the defendant's particular offense warrants the death penalty. When statutes enumerate aggravating circumstances, the presumption, if it may so be called, rests in favor of death.<sup>94</sup> The complete rejection of other principles, for ex-

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91. *Blystone*, 494 US 323-24 (Brennan dissenting).

92. *Penry v Lynaugh*, 492 US 302 (1989); *California v Brown*, 479 US 538, 545 (1987) (O'Connor concurring). Note that Justice O'Connor joined the majority in *Blystone*.

93. Examples might include the moral differences that might exist in a particular case between robbery and rape or between the triggerman and an accomplice.

94. In many ways, this approach threatens to return us to the "arbitrary and capricious" results experienced prior to *Furman*. When a legislature acts in the abstract, far removed in time and place from a trial, it imposes its will somewhat blindly. At least when the results of a jury were arbitrary and capricious in light of the facts of particular cases, it was because the jury was blinded by emotions, even ugly ones. *Lowenfield v Phelps*, 484 US 231 (1988), held that the sole aggravating circumstance may consist of an element of the offense of capital murder. In *Commonwealth v Holcomb*, 508 Pa 425, 498 A2d 833 (1985), the Pennsylvania Supreme Court interpreted 42 Pa Cons Stat Ann § 9711(d)(6) (Purdon 1988) to allow capital sentencing even where the underlying felony is nonviolent. Such a sentence will be mandatory after *Blystone*, presumably for such "aggravating" crimes as battery, stolen vehicles, or even certain conspiracies. This leaves the discretion of Pennsylvania's able prosecutors and the willingness of presumably rational defendants to offer mitigation as the main barriers to abuse. The potential for lawlessness by juries, in failing to convict guilty defendants for fear of mandatory death sentences where they were unwarranted, was a ground for holding the North Carolina statute unconstitutional in *Woodson*, 428 US at 302-03.

ample the non-execution of the mentally retarded,<sup>95</sup> introduction of inflammatory victim impact statements containing information the perpetrator could not have known at the time of the crime,<sup>96</sup> and the rejection of the ancient proportionality requirement,<sup>97</sup> clearly show that the United States Supreme Court now considers themselves free to implement the harshest penalties the population will support.

There is some evidence supporting the argument that the Court has always been supportive of a state's rights to execute murderers whenever doing so was in a non-discriminatory manner. For example, more modern methods of execution have been accepted in *Wilkerson v Utah*<sup>98</sup> (public shooting) and *In re Kemmler*<sup>99</sup> (electrocution). These are no less horrible than hanging.<sup>100</sup> Lethal gas chambers have withstood attack despite the trend in the states towards lethal injections.<sup>101</sup> But now the Eighth Amendment seems destined to become little more than an outline for prison facility maintenance. A constitutional system which allows private rights to be taken away by an unelected branch of government is a precarious one.

The expansion of individualized liberties under constitutional doctrines, which necessarily involves trade-offs against the rights of society collectively, may not be welcomed in all circles; but such expansion hardly threatens the republic. When the Court is allowed to diminish the rights already established or vested in the people by their Constitution, the only limits on the erosion are the temperaments of the justices. The proper method of removing individual constitutional protection, for the protection of society in general should be by constitutional amendment. If the Justices will

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95. *Penry*, 492 US 302 (1989).

96. *Payne*, 111 S Ct 2597 (1991).

97. *Harmelin*, 111 S Ct 2680 (1991).

98. 99 US 130 (1878).

99. 136 US 436 (1890).

100. The Due Process Clauses of the Fifth and Fourteenth Amendments provide better standards for death penalty review. For example, Justice Frankfurter believed the Eighth Amendment did not apply to the states, yet he believed the Fourteenth Amendment itself "expresses a demand for civilized standards." Nevertheless, he felt that "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Andres v United States*, 333 US 740, 752 (1948).

Note that *Andres* was a review of a federal death penalty statute. Any reference to the standards of the Fourteenth Amendment are therefore either dicta, or incorporated tacitly as requirements of the Fifth Amendment's Due Process Clause and then applicable against the federal government.

101. *Gray v Lucas*, 463 US 1237 (1983).

not impose such a limit upon themselves, as by a rule of Court requiring super majority, we may soon find it incumbent upon ourselves to impose on them.

When the Court employs the fiction that the legislature has expressed the will of the people by looking to the statutes to determine contemporary moral standards,<sup>102</sup> it cannot do so as well as the legislature. The Court has neither the expertise nor the resources to make such an assessment accurately. The justices need not even stand for re-election. Furthermore, attempts by the Court to discern popular opinion constitute circular reasoning: the Constitution is interpreted by the Court to protect, among other things, individual rights from majority despotism; the majority elects the representatives who pass laws; those laws are then used by the Court to define constitutional limits.

Although the majority's exercise of its will moves by "fits and starts" and may take decades to come to fruition because the Court looks to majority standards, it is inevitable that those standards will ultimately prevail. The Constitution is only a friction on majority will—it cannot protect the individual.

### CONCLUSION

There are some who believe, as did John Locke and Thomas Hobbes,<sup>103</sup> that laws are meant to protect us from others. This is apparently the view of the current majority on the Court. Others, including David Hume<sup>104</sup> and some members of the Constitutional Convention, believe that laws are also meant to protect us from ourselves. The twentieth century has provided us with some powerful examples that this is by no means an outdated function of the law.

But the unelected branch is often loathe to stand on unpopular grounds.<sup>105</sup> The United States Supreme Court should direct its ef-

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102. In *Gregg*, for example, the United States Supreme Court cited Gallup and Harris polls which concluded popular support for the death penalty. *Gregg*, 428 US at 181 n 25. Similarly, in *Weems* the Court stated that the Eighth Amendment's interpretation must "acquire meaning as public opinion becomes enlightened." *Weems*, 217 US at 378. See also *Furman*, where it was stated: "In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." *Furman*, 408 US at 383 (Burger dissenting).

103. See Jonathan Harrison, *Hume's Theory of Justice* 172 (Clarendon Press, 1981).

104. Harrison, *Hume's Theory of Justice* at 172 (cited in note 103).

105. This is so even when it makes decisions such as *Plessey v Fergusson*, 163 US 537 (1896) (holding that segregation on railroad cars was not a violation of equal protection). Compare *Brown v Board of Education*, 347 US 483 (1954) (holding that school segregation

forts at expanding the protections afforded to individuals rather than jeopardizing our freedoms by bowing to public frustration at crime. Although this comment has examined constitutional jurisprudence in the context of the Eighth Amendment, the "evolving moral standards" doctrine can be used to limit liberty and property interests as well. If the Court can take fundamental rights away merely because it feels the majority does not support the right, it serves little purpose. It is then merely a less responsive house of the legislature.

All protections afforded individuals under the purposely vague provisions of the Constitution, such as "cruel and unusual punishment," "freedom from unreasonable search and seizure," "freedom of the press" and the penumbral rights, apparently may be eliminated by the concerted efforts of a bare majority of the Court acting unfettered by precedent or history.

The words of the Bill of Rights are still an aspiration, but as substantive law they are a thin reed upon which to rest our lives, liberty and property. When fundamental liberty interests need to be curtailed, is the United States Supreme Court the proper institution to do so?

*W. Lindman*

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is violative of equal protection). Only political pressure can explain the Court's reversal. If the Court may strike away such protections, even *Brown's* survival cannot be assured.



